

Krystyna Benc and Eligiusz Kordyla (respondents/plaintiffs) v. Laura Parker
(appellant/defendant) and John Ross McDonald, Janet Lee McDonald and Alysse McDonald
(not a party to the appeal/defendant)
(1201-0039-AC; 2012 ABCA 249)

Indexed As: Benc et al. v. Parker et al.

Alberta Court of Appeal
Martin and Bielby, J.J.A., and Macleod, J.(ad hoc)
August 30, 2012.

Summary:

Benc commenced an action against the appellant arising out of a motor vehicle accident. The appellant requested that Benc attend for a certified medical examination pursuant to the Minor Injury Regulation to assess whether her injuries were "minor injuries", which would cap damages for non-pecuniary losses. Dr. Stelmaschuk was advised of his selection as certified examiner on November 18, 2010. Section 9(1) of the Regulation stated that "The certified examiner must make reasonable efforts to schedule the assessment of the claimant for a time that is convenient to the claimant and that is within 30 days of the referral to the certified examiner". On December 16, 2010, Dr. Stelmaschuk sent a fax to Benc's counsel listing eight alternative dates, all after December 18, 2010. Benc's counsel took the position that Dr. Stelmaschuk had failed to comply with s. 9(1) of the Regulation and Benc was not required to attend any subsequently scheduled examination because the original examination had not been held within 30 days of the referral to the doctor. The appellant applied for an order setting a peremptory date for Benc to attend a certified medical examination with Dr. Stelmaschuk.

A Master of the Alberta Court of Queen's Bench interpreted s. 9(1) to require only that Dr. Stelmaschuk make reasonable efforts to schedule the examination within 30 days of referral, not that the examination itself had to be held within that period. She ruled that Dr. Stelmaschuk made the reasonable efforts required by s. 9(1) and she declared that the appellant retained the right to require Benc to attend before a certified examiner under the Regulation. Benc appealed.

The Alberta Court of Queen's Bench (the chambers judge) agreed that s. 9(1) did not require the certified examination to be held within 30 days of referral, but concluded that Dr. Stelmaschuk had not made reasonable efforts to schedule the assessment. The chambers judge declined to determine whether the appellant was entitled to require Benc to attend an examination in the future. The appellant appealed.

The Alberta Court of Appeal allowed the appeal in part. The court held that Dr. Stelmaschuk made reasonable efforts to schedule Benc's certified examination as required by s. 9(1) of the Regulation. Either party could apply for a determination in advance of trial that Benc had no reasonable excuse for not attending to be examined by Dr. Stelmaschuk (s. 10(3) of the Regulation). If she established that she had a reasonable excuse, either party could reschedule her certified examination at their option.

Courts - Topic 584

Judges - Duties - To determine issues - The appellant (defendant) requested that Benc (plaintiff) attend for a certified medical examination pursuant to the Minor Injury Regulation to assess whether her injuries were "minor injuries" - Dr. Stelmaschuk was selected as the certified examiner - Benc's counsel took the position that Dr. Stelmaschuk failed to comply with s. 9(1) of the Regulation and Benc was not required to attend any subsequently scheduled examination because the original examination had not been held within 30 days of the referral to the doctor - A Master ruled that Dr. Stelmaschuk made the reasonable efforts to schedule the assessment as required by s. 9(1) and declared that the appellant retained the right to require Benc to attend before a certified examiner under the Regulation - Benc appealed - The chambers judge concluded that Dr. Stelmaschuk had not made reasonable efforts to schedule the assessment - The chambers judge declined to determine whether the appellant was entitled to require Benc to attend an examination in the future - On appeal, the Alberta Court of Appeal stated that "While the chambers judge decided that the certified examiner had not made reasonable efforts to schedule the assessment as required under s. 9, he declined to determine what consequences flowed as a result. He should have made that decision. The issue was squarely before him because it had been addressed and decided by the Master in the order under appeal. His failure to decide it was a reviewable error" - See paragraph 33.

Insurance - Topic 4126.2

Automobile insurance - Accident benefits - Certified examiner's medical opinion - The appellant (defendant) requested that Benc (plaintiff) attend for a certified medical examination pursuant to the Minor Injury Regulation to assess whether her injuries were "minor injuries", which would cap damages for non-pecuniary losses - Dr. Stelmaschuk was advised of his selection as certified examiner on November 18, 2010 - Section 9(1) of the Regulation stated that "The certified examiner must make reasonable efforts to schedule the assessment of the claimant for a time that is convenient to the claimant and that is within 30 days of the referral to the certified examiner" - Should a claimant fail to attend an assessment without reasonable excuse, the claimant's injury was deemed to be a minor injury to which the cap applied (s. 10(3)(a)) - On December 16, 2010, Dr. Stelmaschuk faxed Benc's counsel listing eight alternative dates after December 18, 2010 - Benc's counsel took the position that Dr. Stelmaschuk failed to comply with s. 9(1) of the Regulation and Benc was not required to attend any subsequently scheduled examination because the original examination had not been held within 30 days of the referral to the doctor - A Master interpreted s. 9(1) to require only that Dr. Stelmaschuk make reasonable efforts to schedule the examination within 30 days of referral, not that the examination itself had to be held within that period - She ruled that Dr. Stelmaschuk made the reasonable efforts required by s. 9(1) and declared that the appellant retained the right to require Benc to attend before a certified examiner under the Regulation - Benc appealed - The chambers judge agreed that s. 9(1) did not require the certified examination to be held within 30 days of referral, but concluded that Dr. Stelmaschuk had not made reasonable efforts to schedule the assessment - The appellant appealed - The Alberta Court of Appeal held that Dr. Stelmaschuk made reasonable efforts to schedule Benc's certified examination as required by s. 9(1) - The court also held that the Regulation gave courts the power to

order steps be taken to facilitate the operation of the rights and duties it expressly created, even when those steps were not specifically prescribed - That included the power to determine in an interlocutory proceeding whether a claimant had, or did not have, a reasonable excuse for failure to attend a certified examination, rather than wait until trial - Accordingly, either party could now apply pursuant to s. 10(3) to determine whether Benc had a reasonable excuse for failing to participate in the process for scheduling her certified examination.

Cases Noticed:

Kubel v. Alberta (Minister of Justice), 2005 ABQB 836, refd to. [para. 3].
Morrow et al. v. Zhang et al. (2009), 454 A.R. 221; 455 W.A.C. 221; 2009 ABCA 215, leave to appeal denied (2009), 403 N.R. 394 (S.C.C.), refd to. [para. 4].
Housen v. Nikolaisen et al., [2002] 2 S.C.R. 235; 286 N.R. 1; 219 Sask.R. 1; 272 W.A.C. 1; 2002 SCC 33, refd to. [para. 19].
Edmonton (City) v. Innvest Properties MacDonald Nominee Ltd. (2010), 498 A.R. 150; 2010 ABQB 459, refd to. [para. 19].
BPCL Holdings Inc. et al. v. Alberta et al. (2008), 429 A.R. 311; 421 W.A.C. 311; 2008 ABCA 153, refd to. [para. 19].
Alberta Union of Provincial Employees v. Alberta, [2010] A.R. Uned. 194; 2010 ABCA 147, refd to. [para. 20].
Zahmol Properties Ltd. v. Calgary (City) (2009), 448 A.R. 390; 447 W.A.C. 390; 2009 ABCA 97, refd to. [para. 20].
Bahcheli v. Yorkton Securities Inc. et al. (2012), 524 A.R. 382; 545 W.A.C. 382; 2012 ABCA 166, refd to. [para. 26].
Sparrowhawk v. Zapoltinsky, [2012] A.R. TBEEd. JA.108; 2012 ABQB 34, refd to. [para. 27].
Madill v. Alexander Consulting Group Ltd. et al. (1999), 237 A.R. 307; 197 W.A.C. 307; 1999 ABCA 231, refd to. [para. 34].
Abbas v. Menhem (2010), 514 A.R. 379; 2010 ABQB 527, refd to. [para. 37].
R. v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771, [2005] 3 S.C.R. 425; 341 N.R. 357; 275 Sask.R. 1; 365 W.A.C. 1; 2005 SCC 70, refd to. [para. 48].

Statutes Noticed:

Insurance Act Regulations (Alta.), Minor Injury Regulation, Reg. 123/2004, sect. 9(1) [para. 7]; sect. 10(3) [para. 8].
Minor Injury Regulation - see Insurance Act Regulations (Alta.).

Authors and Works Noticed:

Alberta, Hansard, Legislative Assembly Debates, December 3, 2003, p. 210 [para. 3].
Hansard - see Alberta, Hansard, Legislative Assembly Debates.
Kerans, Roger P., and Willey, Kim W., Standards of Review Employed by Appellate Courts (2nd Ed. 2006), pp. 197, 198 [para. 20].
Sullivan, Ruth, Sullivan on the Construction of Statutes (5th Ed. 2008), pp. 359, 360 [para. 39]; 469 [para. 48].

Counsel:

B.W. Conway, for the respondents/plaintiffs;
D.M. Pick, for the appellant/defendant.

This appeal was heard on June 14, 2012, before Martin and Bielby, JJ.A., and Macleod, J. (ad hoc), of the Alberta Court of Appeal. The following reasons for judgment reserved of the Court of Appeal were delivered by Bielby, J.A., and were filed on August 30, 2012.

Appeal allowed in part.

Editor: Angela E. McKay